

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SAUL CHILL and SYLVIA CHILL, for the
use and benefit of the CALAMOS GROWTH
FUND,

Plaintiffs,

vs.

CALAMOS ADVISORS LLC,

Defendant.

Civil Action No.: 15 Civ. 1014

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PARTIALLY
EXCLUDE THE PROPOSED EXPERT OPINIONS OF ARTHUR B. LABY**

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This action concerns claims for excessive investment advisory fees pursuant to Section 36(b) of the Investment Company Act of 1940 (“ICA”). Plaintiffs respectfully submit this memorandum of law in support of their motion to partially exclude the proposed expert opinions of Defendant’s expert witness Arthur B. Laby (“Professor Laby”) pursuant to Rules 402, 403, 702, 703 and 704 of the Federal Rules of Evidence. For the reasons set forth below, this Court respectfully should grant Plaintiffs’ motion.

PRELIMINARY STATEMENT

Defendant Calamos Advisors LLC (“CAL”) offers Professor Laby’s proposed testimony in support of its contention that the Board’s process for reviewing and approving the advisory fees CAL charged the Fund (the “15(c) process”) was [REDACTED] [REDACTED]

[REDACTED] Putting aside that the purported hallmarks of the Board’s “robust” process are the *bare minimum* one would expect from a mutual fund board – [REDACTED]

[REDACTED] – Professor Laby’s proposed testimony includes impermissible legal opinions that must be excluded. Specifically, Professor Laby opines that [REDACTED]

[REDACTED] *only the Court* is permitted to state what the governing law is, what its requirements are, and how it applies.

But even if Professor Laby was permitted to offer legal opinions, his proposed testimony [REDACTED] should still be excluded because it is entirely unhelpful. [REDACTED]

[REDACTED]

[REDACTED]

Finally, and separate from [REDACTED], Professor Laby relies heavily on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

However, given that the prejudice here is extreme the Court should preclude Professor Laby from offering any opinion based on [REDACTED] under Rule 403. Most notably, Plaintiffs will be unable to effectively cross examine [REDACTED] at trial regarding the substance of [REDACTED] because Defendant did not maintain a complete contemporaneous record of what was said. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As such, Defendant should not be permitted to offer expert opinions based on [REDACTED], especially when it intentionally deprived Plaintiffs of any means of effectively cross-examining [REDACTED].

FACTS RELEVANT TO PROFESSOR LABY'S OPINIONS

Professor Laby is a faculty member at Rutgers Law School and teaches securities and business law courses. [REDACTED]

That

Legislative history makes it clear that, even if the directors and adviser have in fact reached an informed and independent decision, the court must address itself to the measure of the fees on its merits. *Here, judicial supervision continues, when, under the business judgment rule, it would cease.* In other words, an independent and informed approval by the shareholders and directors is only one factor that courts should take into account in passing on the legality of the fees.

In rendering his opinions in this matter, Professor Laby relied [REDACTED]

[illegible]

ARGUMENT

I. Applicable Legal Standard

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony at trial. That rule provides that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The party offering an expert opinion “has the burden of establishing its admissibility by a preponderance of the evidence.” *See In re Mirena IUD Prods. Liability Litig.*, 169 F. Supp. 3d 396, 411 (S.D.N.Y. 2016). However, in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Supreme Court made clear that the district court is the “ultimate gatekeeper” under Rule 702, *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007), and is therefore required to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand,” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (quoting *Daubert*, 509 U.S. at 597).

The first step in determining whether an expert’s opinion is reliable under *Daubert* is “determining ‘whether the expert is qualified to testify.’” *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 282 (S.D.N.Y. 2011) (quoting *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 422 (S.D.N.Y. 2009)). Assuming the proffered expert is

sufficiently qualified, the court must next consider “the [remaining] indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case.” *Amorgianos*, 303 F.3d at 265 (internal citations omitted).

II. The Court Should Preclude Professor Laby’s Opinions Regarding [REDACTED]

A. Professor Laby’s Opinions Regarding [REDACTED] Constitute Impermissible Legal Conclusions

“As a general rule an expert’s testimony on issues of law is inadmissible.” *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *see also United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008) (“The only legal expert in a federal courtroom is the judge.”); *United States v. Leo*, 941 F.2d 181, 196-97 (3d Cir. 1991) (stating that a court must be careful to “limit expert testimony so as to not allow the expert to offer opinion on what the law required or testify as to the governing law.”) (internal quotation marks omitted).

As one court in this district has explained:

The rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle. In fact, every circuit has explicitly held that experts may not invade the court’s province by testifying on issues of law.

In re Initial Public Offering Litig., 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (internal citations and quotation marks omitted). Thus, courts in this Circuit will exclude opinions that “communicate[e] a legal standard – explicit or implicit –to the jury” or that are “phrased in terms of inadequately explored legal criteria.” *Hygh v. Jacobs*, 961 F.2d 359, 363-64 (2d Cir. 1992).

Here, Professor Laby opines, *inter alia*, that:

[REDACTED]

As an initial matter, Professor Laby is simply wrong that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In fact, Professor Laby coauthored a treatise which makes clear [REDACTED] flatly inconsistent with a district court's function in weighing a claim for excessive fees under the ICA:

Legislative history makes it clear that, even if the directors and adviser have in fact reached an informed and independent decision, the court must address itself to the measure of the fees on its merits. *Here, judicial supervision continues, when, under the business judgment rule, it would cease.* In other words, an independent and informed approval by the shareholders and directors is only one factor that courts should take into account in passing on the legality of the fees.

See McNeela Decl. Ex. C (annexing Tamar Frankel and Arthur B. Laby, *The Regulation of Money Managers, Mutual Funds and Advisors*, § 12.03[D] at 12-103 (3d ed.) (emphasis added)).

However, even if Professor Laby's statement of [REDACTED]

[REDACTED]

[REDACTED] are paradigmatic examples of impermissible legal conclusions.⁴ See *Hygh*, 961 F.2d at 364 (expert may not expound on "legal standards"); *Kidder, Peabody & Co., Inc. v. IAG Int'l Acceptance Grp. N.V.*, 14 F. Supp. 2d 391, 404 (S.D.N.Y. 1998) ("To the extent that Professor Miller would seek to opine . . . that [plaintiff]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

acted reasonably and in good faith – as he argues at length in his written report – the overwhelming weight of Second Circuit authority precludes expert testimony about these issues.”).⁵ Indeed, as one case directly on point noted:

The business judgment rule is a purely legal doctrine As the rule is a legal creation, any attempt by [defendants’ expert] to define and apply the business judgment rule to the present case constitutes an attempted usurping of the roles of both the Court and the jury in this case. [Defendants’ expert’s] description of the boundaries of the business judgment rule falls squarely within the province of the Court and is inadmissible

Airline Reporting Corp. v. Belfon, No. 03 Civ. 146, 2010 WL 3664065, at *28 (D.V.I. Sept. 16, 2010).

Accordingly, this Court should respectfully bar Professor Laby from offering any testimony regarding [REDACTED]

[REDACTED]

B. Professor Laby’s Opinions Regarding [REDACTED] Are Unhelpful

Even if Professor Laby were permitted to opine [REDACTED] his testimony should nonetheless be precluded for the independent reason that it would be entirely unhelpful. This is because Professor Laby testified at deposition that [REDACTED]

[REDACTED]

[REDACTED]

⁵ See also *Andrews v. MetroNorth Commuter R. Co.*, 882 F.2d 705, 709 (2d Cir. 1989) (expert could not opine as to whether certain actions were negligent); *Strong v. E.I. Strong*, 667 F.2d 682, 686 (8th Cir. 1981) (expert could not opine on whether lack of product warnings was reasonable); *Aguilar v. Int’l Longshoremen’s Union Local # 10*, 966 F.2d 443, 447 (9th Cir. 1992) (“Here, the reasonableness and foreseeability of the casual worker’s reliance were matter of law” and “were inappropriate subjects for expert testimony”).

[REDACTED]

[REDACTED]

First, as the following exchange makes clear, Professor Laby does not know, in the context of an action under the ICA, whether the [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

[REDACTED]

Second, Professor Laby admitted that there [REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

However, when pressed as to state [REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Accordingly, because Professor Laby's opinions concerning [REDACTED]

[REDACTED]

[REDACTED] they must be precluded in their entirety.

II. The Court Should Preclude Professor Laby From Offering Any Opinions Based on

In addition to relying on materials produced during fact discovery, Professor Laby also based his opinions on [REDACTED]

[REDACTED] As discussed below, this Court should preclude Professor Laby from testifying as to the substance of [REDACTED]
[REDACTED] because any information conveyed [REDACTED] is both unreliable and prejudicial.

Professor Laby testified that he

Making matters worse, Professor Laby essentially admitted that

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own deposition testimony” and was “based on incorrect factual assumptions that rendered [it] . . . purely speculative”); *Travelers Indem. Co. v. Northrop Grumman Corp.*, 3 F. Supp. 3d 79, 107-108 (S.D.N.Y. 2014), *aff’d*, 677 Fed. Appx. 701, 2017 WL 391926 (2d Cir. 2017) (precluding defendant’s expert’s opinion because it was contrary to the known facts in the testimony by the defendant’s former employee); *Zhao v. Kaleida Health*, No. 04 Civ. 467, 2008 WL 346205, at *8 (W.D.N.Y. Feb. 7, 2008) (precluding expert’s opinion where the “assumptions contained in his report [we]re directly contradicted by the [plaintiff’s] emails”).

In sum, Professor Laby should be precluded from testifying about [REDACTED] [REDACTED] or offering any opinions based on such information. However, if the Court declines to preclude such testimony, it should, at a minimum, assign Professor Laby’s opinions little weight. *See, e.g., Hudson v. Preckwinkle*, No. 13 Civ. 8752, 2015 WL 1541787, at *11 (N.D. Ill. Mar. 31, 2015) (“The Court assigns little weight to [the expert’s testimony] due to its significant flaws First, [the expert’s] heavy reliance on . . . statements that are not subjected to cross examination or even verified by oaths reflects his desire to rely on evidence that has not been subjected to scrutiny or validated . . .”).

CONCLUSION

For the foregoing reasons, this Court respectfully should preclude Professor Laby from: (i) testifying about [REDACTED] [REDACTED] and (ii) offering any opinions based on [REDACTED] [REDACTED]

Dated: February 9, 2018
New York, New York

Respectfully submitted,

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